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May 21, 2002

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see www.revenue.state.il.us/Laws/regs/part1200/), is in response to your letter of April 11, 2002. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to ABC for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither ABC nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

FIRM, on behalf of our client, ABC, respectfully requests that the Illinois Department of Revenue (the 'Department') issue a Private Letter Ruling ('PLR') pursuant to 2 Ill. Admin. Code 1200.110 with respect to the following factual situation.

General Information

Enclosed please find an original Form IL-2848, Power of Attorney, authorizing FIRM to represent ABC.

This PLR is not requested with regard to hypothetical or alternative proposed transactions. The PLR is requested to determine the Retailers' Occupation Tax ('ROT') and/or Use Tax ('UT') consequences of the actual business practice of ABC.

ABC is not currently engaged in litigation with the Department with regard to this or any other tax matter. ABC is not currently under audit by the Department.

To the best knowledge of ABC's personnel, and to the best of our knowledge, the Department has not previously ruled regarding this matter to ABC. Neither ABC, nor FIRM on ABC's behalf, have at any time prior submitted the same or a similar issue to the Department.

ABC requests that certain information be deleted from the PLR prior to dissemination to others. ABC requests that its name, the location of its headquarters and Illinois facilities, the name of its representatives, and the first paragraph of the Statement of Material Facts be deleted.

Statement of Material Facts

ABC is a retailer of thousands of unique products sold globally through various means, including televised programming reaching millions of households worldwide. ABC sells products in the following categories: Home and Entertainment, Health and Beauty, Fashion and Jewelry, and Electronics. ABC maintains its headquarters in CITY/STATE.

ABC's current sales order approval process involves several steps. While many of these steps occur at various locations outside of Illinois, the final step in the order review process for Illinois sales occurs at the regional sales administration center operated on ABC's behalf by its contractor in CITY, Illinois ('Contractor'). Customers can order products from ABC either via a toll-free telephone number or directly over the Internet. Telephone and Internet orders are received at various call centers located outside Illinois and are entered into ABC's mainframe order entry computer system in STATE. The mainframe computer system performs initial order approval processes such as determining product availability and validating the customer's credit card information. Each day, after this initial processing is complete, all orders for Illinois customers are sent electronically to Contractor in the CITY, Illinois office where Contractor performs the final review procedures. All orders are filled from inventory held outside of Illinois and ABC ships ninety percent (90%) of its orders within 48 hours of receiving the orders.

Illinois imposes Retailer's Occupation Tax ('ROT') at the 'high' rate (6.25% plus local tax) on most items of tangible personal property. However, certain items such as food, drugs and medical appliances are subject to the 'low' rate ROT (1% plus local tax). To ensure strict adherence to Illinois' complicated system of taxation, ABC and Contractor have executed an Independent Contractor Agreement ('the Agreement') that establishes the duties and powers of Contractor with regard to the order review functions performed on behalf of ABC in CITY, Illinois.

The Agreement provides, in part:

- 1.1 Appointment. [ABC] hereby appoints Contractor as its Independent Contractor, and Contractor hereby accepts such appointment by [ABC], to assist [ABC], through Contractor's CITY Operations, in assessing the taxability and appropriate tax amount for sales transactions between [ABC] and Illinois customers so that [ABC] may finalize the applicable sales transactions.

• * *

- 2.1 Powers of Contractor. Subject to such limitations as may be imposed by law or this Agreement, Contractor is hereby authorized and empowered, in the name of and on behalf of [ABC] without further authorization of [ABC], to enable [ABC] to finalize [ABC's] sales transactions in Illinois by rendering the services set forth in Paragraph 2.3, below.

* * *

2.3 Duties of Contractor. Contractor shall manage the business and affairs of Contractor's CITY Operations in the manner in which Contractor deems necessary or appropriate. Without limiting the generality of the foregoing, Contractor's duties shall include the following:

- (a) to receive from [ABC] a listing of proposed sales transactions ('Transaction List[s]');
- (b) to review the preliminary taxability determinations and tax calculations contained in the Transaction Lists;
- (c) apply Contractor's independent skill and knowledge to validate the preliminary taxability determinations and tax calculations contained in the Transaction Lists;
- (d) to advise [ABC] as to those sales that are inappropriately or incorrectly taxed; and
- (e) at [ABC's] option: (i) to maintain a listing of Illinois residents that have filed for bankruptcy in a Federal Bankruptcy Court within the State of Illinois during the prior sixty (60) days and to compare such bankruptcy listing to the Transaction Lists; and/or (ii) maintain a listing of fraudulent credit card numbers and compare such fraudulent credit card lists to the Transaction Lists.

Contractor notifies ABC within twenty-four (24) hours of any transactions contained therein which are inappropriately or incorrectly taxed. Additionally, where ABC elects to utilize the services outlined in section 2.3(e) of the Agreement, Contractor notifies ABC within twenty-four (24) hours of any proposed sales that are to persons or entities that have filed for bankruptcy during the prior sixty (60) days, or that are made with a fraudulent credit card number, as may be applicable.

Issue

Whether ABC should remit the Retailer's Occupation Tax at the rate in effect in CITY, including any Home Rule Municipal or County ROT or other local taxes as such may be imposed.

Relevant Authorities

The local ROT regulations state that the Department considers the seller's acceptance of the purchase order or other contracting action in the making of the sales contract the most important single factor in the occupation of selling. (86 Ill. Admin. Code Sec. 270.115). The Department has issued several Private Letter Rulings ('PLRs') addressing the application of these rules to various methods of approving orders by retailers (see, e.g., PLR ST 01-0028 (July 12, 2001)). In at least two similar situations, the Department noted that where orders may be subjected to preliminary review processes in one location and at a later time subjected to a final review in a second location in Illinois, the Retailer's Occupation Tax at the rate in effect at the second

location applies to the transactions actually reviewed and approved at the second location. (PLR 87-0340 (May 14, 1987) *and* PLR 91-0162 (March 5, 1991))

86 Ill. Adm. 270.115(b)(1) explicitly states:

If the purchase order is accepted at the seller's place of business within the municipality or by someone who is working out of such place of business...the seller incurs Municipal Retailers' Occupation Tax liability in that municipality if the sale is at retail and the purchaser receives the physical possession of the property in Illinois.

This regulation refers not to an 'employee' working out of the seller's place of business, but rather to 'someone' working out of the seller's place of business. Based on this regulation, it seems to make no difference under the Department's jurisdiction whether the approval of the sale is performed by the Contractor or by the retailer's employee. (see ST 01-0034-PLR 08/13/2001).

Neither we, nor ABC, to the best of our knowledge, know of any authority contrary to the above-cited authorities.

Conclusion

The facts indicate that the final step in ABC's sales order review process for sales to Illinois customers is performed on behalf of ABC by Contractor in CITY, Illinois. Because this final step takes place in CITY, Illinois, the Retailer's Occupation Tax, as opposed to the Use Tax, applies to the sales transactions. Consequently, ABC should remit the ROT at the rate in effect in CITY, Illinois including any Home Rule Municipal or County ROT and any other local ROT taxes that may apply.

Therefore, we respectfully request that the Department issue a ruling confirming our conclusions. Please direct any questions you may have to PERSON.

In the context of a Private Letter Ruling, the Department is unable to make nexus determinations because the amount of information required to make that determination is often best gathered by an auditor. The following information outlines the principles of nexus. We hope it is helpful to you in determining whether your client is responsible to pay tax in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is

properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Cause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Wagner, (1996), 171 Ill.2d 410.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The Use Tax rate is 6.25%.

For your general information, please see the enclosed copy of Sec. 270.115 of the Home Rule Municipal Retailers' Occupation Tax for guidance concerning jurisdictional questions. In general, the imposition of the various sales tax related local taxes in Illinois are triggered when "selling" occurs in a jurisdiction imposing a tax. The Department's opinion is that the most important element of selling is the seller's acceptance of the purchase order. Consequently, if a purchase order is accepted in a jurisdiction that imposes a local tax, that tax will be incurred.

The tax rate is fixed by the location of the seller, not the delivery location. The fact that the item being sold is shipped from out-of-State or from another Illinois location is immaterial for purposes of local taxes if the sale occurs through order acceptance in an Illinois jurisdiction imposing a local tax. For these transactions the local tax will be incurred. Although 86 Ill. Adm. Code 270.115 deals with the municipal Home-Rule taxes, the principles outlined in this regulation apply to all local taxes administered by the Department.

If a purchase order is accepted outside the State, but the property being sold is located in an Illinois jurisdiction that has imposed a local tax (see, for example, Section 270.115(b)(3)), then the location of the property at the time of sale will determine where the seller is engaged in business for the purpose of determining the imposition of applicable local sales taxes.

Based upon the information in your letter, CITY is the jurisdiction that controls the tax rate. For purchase orders accepted in CITY, the local rate in CITY should be imposed.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois

sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.